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In the Supreme Court of the United States

OCTOBER TERM, 1993

STATE OF ALASKA, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a State has standing as *parens patriae* to sue the federal government under the Alaska National Interest Lands Conservation Act, 16 U.S.C. 3120.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is unpublished, but the judgment is noted at 981 F.2d 1259 (Table). The opinion of the district court (Pet. App. 8a-43a) is unpublished.

JURISDICTION

The judgment of the court of appeals (Pet. App. 6a-7a) was entered on December 7, 1992. A petition for rehearing was denied on February 25, 1993. Pet. App. 44a-45a. The petition for a writ of certiorari was filed on May 26, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1980, Congress enacted the Alaska National Interest Lands Conservation Act (ANILCA), Pub. L. No. 96-487, 94 Stat. 2371 (codified at 16 U.S.C. 3101 *et seq.*), to add substantial tracts of land to the national park system in Alaska. In so doing, Congress took cognizance of the fact that many Alaska residents occupied cabins and other sites on the land covered by the Act without any legal interest in the occupied land. See S. Rep. No. 413, 96th Cong., 1st Sess. 304 (1979). Because Alaska residents in many instances had lived on those lands for many years unaware of the legal requirements of the public land laws, Congress sought to establish a permitting system that would allow a continuation of that life style where it did not present a real danger to the resources that the Act sets aside. *Ibid.*

To implement that goal, ANILCA established a tiered system for the treatment of persons who occupied cabins on the national park system lands created or added by the Act. Specifically, the Act made available three types of permits for continued occupancy. First, the occupants of cabins existing before December 18, 1973, could apply for five-year renewable, nontransferable permits. 16 U.S.C. 3193 (a)(1). Second, persons who began to occupy or use cabins between December 18, 1973, and December 1, 1978, were eligible for nonrenewable, nontransferable one-year occupancy permits. 16 U.S.C. 3193(a)(2). Third, the Secretary of the Interior was given authority to issue permits "under such conditions as he may prescribe for the temporary use, occupancy, construction and maintenance of new cabins or other structures if he determines that the use is necessary

to reasonably accommodate subsistence uses or is otherwise authorized by law." 16 U.S.C. 3193(a)(4).[1]

In enacting ANILCA, Congress also adopted procedural protections for subsistence users of public lands. Section 810(a) of ANILCA, 16 U.S.C. 3120(a), provides:

> In determining whether to withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of public lands under any provision of law authorizing such actions, the head of the Federal agency having primary jurisdiction over such lands or his designee shall evaluate the effect of such use, occupancy, or disposition on subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and other alternatives which would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes.

If one of the actions enumerated in Section 810(a) "would significantly restrict subsistence uses," the pertinent federal agency may not proceed until it determines, after notice and a hearing, that the restriction on subsistence uses is necessary; that the action will use "the minimal amount of public lands necessary" to achieve its purposes; and that "reasonable steps" will be taken to minimize the impact on "subsistence uses and resources." *Ibid.*; see *Amoco Production Co.* v. *Village of Gambell*, 480 U.S. 531, 544 (1987).

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[1] Cabins and other structures not under such a permit may be used only for official government business. 16 U.S.C. 3193(a)(3).

2. This case arises from the issuance by the National Park Service (NPS) of regulations governing the use of cabins and other structures on national park system lands in Alaska. On April 3, 1984, the NPS issued a notice of proposed rulemaking on that subject. *National Park System Units in Alaska*, 49 Fed. Reg. 13,160. After considering 269 written comments and holding three public hearings, the NPS issued a final rule concerning the use of cabins. See *National Park System Units in Alaska*, 51 Fed. Reg. 33,474 (1986). That rule, which is codified at 36 C.F.R. 13.17, establishes procedures for granting cabin use and occupancy permits on national park system lands.[2] In adopting the final rule, the NPS prepared an environmental assessment, as required by the National Environmental Policy Act, 42 U.S.C. 4331 *et seq.*, and prepared an evaluation of the effects of the rulemaking on subsistence uses, as required by Section 810 of ANILCA, 16 U.S.C. 3120. 51 Fed. Reg. at 33,484. NPS concluded that the proposed action would not result in a significant restriction of subsistence uses. Pet. App. 22a.

3. Petitioner State of Alaska brought this action against the United States, the NPS, and the Secretary of the Interior challenging the regulations issued by the NPS on the ground that the NPS did not adequately perform the subsistence analysis under Section 810.[3] Citing this Court's decision in

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[2] The rule required, *inter alia*, that a permittee occupy the cabin "a substantial portion of the time" (36 C.F.R. 13.17(e)(2)) —which is defined as four continuous months and six months total in each year after 1986. 36 C.F.R. 13.17(c).

[3] Various environmental groups also intervened to challenge the NPS's regulations. See Pet. App. 9a n.1, 12a.

Alfred L. Snapp & Son, Inc. v. *Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982), the government moved to dismiss on jurisdictional grounds, arguing that petitioner lacked standing to bring the action as *parens patriae* against the federal government. The district court denied that motion, reasoning that the alleged injury to the health and welfare of petitioner's citizens gave it standing to sue as *parens patriae*. See Pet. App. 12a-14a.

On the merits, the district court rejected certain procedural objections made by petitioner to the NPS's adoption of and refusal to reconsider the pertinent regulations. See Pet. App. 17a-21a. The court also found that the NPS had complied with statutory requirements of Section 810. See Pet. App. 21a-25a. The court first rejected petitioner's contention that the NPS had improperly conducted a Section 810 analysis without a meaningful opportunity for public comment; because Section 810 requires public comment only where, unlike here, the agency finds a significant restriction on subsistence uses, it concluded that no public comment was required in this case. Pet. App. 23a-24a. The court similarly rejected petitioner's claim that the NPS had relied on outdated information in making its Section 810 evaluation, pointing out that petitioner "ha[d] not shown how more up-to-date information * * * would support a significantly different evaluation outcome." Pet. App. 25a.[4]

4. In an unpublished opinion, the court of appeals remanded the case for dismissal of petitioner's suit on standing grounds. Pet. App. 1a-5a. The court

[4] The district court also invalidated two regulations not at issue here. Pet. App. 30a-36a.

reasoned that *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, *supra*, made clear that a State does not have standing as *parens patriae* to bring suit against the federal government. Pet. App. 3a. Although the court of appeals acknowledged that *parens patriae* standing would at one time have been available under Ninth Circuit precedent, the court explained that it had since construed this Court's subsequent decision in *Snapp* to require a different result. Pet. App. 3a (citing *Nevada* v. *Burford*, 918 F.2d 854, 858 (9th Cir. 1990), cert. denied, 111 S. Ct. 2052 (1991)). Finally, the court of appeals rejected petitioner's contention that the judicial review provisions of the Administrative Procedure Act (APA), 5 U.S.C. 702, and ANILCA implicitly granted petitioner standing.[5] Pet. App. 4a.

ARGUMENT

Petitioner argues that the court of appeals erred in rejecting petitioner's standing as *parens patriae* to sue the federal government. Pet. 11-21. That contention is inconsistent with this Court's cases and with the uniform decisions of every court of appeals to have considered the issue since this Court's decision in *Snapp*. Further review of the unpublished decision below therefore is unwarranted.

1. In *Massachusetts* v. *Mellon*, 262 U.S. 447, 485 (1923), this Court rejected the principle that "a State, as *parens patriae*, may institute judicial proceedings to protect citizens of the United States from the

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[5] The court also dismissed the intervenors' claims because they had not demonstrated standing to sue. Pet. App. 4a-5a. The intervenors have not sought further review.

operation of the statutes thereof." As the Court there explained:

> While the State, under some circumstances, may sue in that capacity for the protection of its citizens, it is no part of its duty or power to enforce their rights in respect of their relations with the Federal Government. In that field it is the United States, and not the State, which represents them as *parens patriae*, when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status.

Id. at 485-486 (citation omitted). The Court has consistently reaffirmed that principle in subsequent cases. See *Snapp*, 458 U.S. at 610 n.16 ("A State does not have standing as *parens patriae* to bring an action against the Federal Government."); *South Carolina* v. *Katzenbach*, 383 U.S. 301, 324 (1966); *Florida* v. *Mellon*, 273 U.S. 12, 18 (1927); see also 12 J. Moore, H. Bendix & B. Ringle, *Moore's Federal Practice* ¶ 350.02[3], at 3-20 (2d ed. 1993) ("a state has no standing to sue as parens patriae to protect citizens of the United States from the operation of a federal statute because it is the United State[s] which stands as parens patriae in such a case and not an individual state").[6]

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[6] As one commentator has explained, the doctrine that States lack standing to sue the United States as *parens patriae* reflects

> the principle that the federal government is a sovereign coexisting in the same territory with the states and acting, not through them, like some international organization, but directly upon the citizenry, which is its own as well as

Petitioner argues (Pet. 13-14) that the principle of *Massachusetts* v. *Mellon* was undercut by this Court's decisions in *New York* v. *United States*, 331 U.S. 284 (1947), and *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954). To be sure, in *New York* v. *United States*, this Court reached the merits in a case in which the district court had permitted States to challenge an ICC order as *parens patriae*. See *New York* v. *United States*, 65 F. Supp. 856, 872 (N.D.N.Y. 1946). But there was an alternative ground for standing in that case (*ibid.*), and in affirming the trial court's decision (which had sustained the ICC order), this Court did not address the issue of standing. Nor did this Court address standing in *Phillips Petroleum*,[7] which affirmed a court of appeals' decision that reversed an order of the FPC and that likewise did not address the standing issue. "[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before [it]." *Pennhurst State School & Hosp.* v. *Halderman*, 465 U.S. 89, 119 (1984) (quoting *Hagans* v. *Lavine*, 415

> theirs. The states are built into the political structure of the federation, and play their part in the formation of its institutions. But they are not to contest, as if between one sovereign and another in some quasi-international forum, the actions of the national institutions. For the national government is fully in privity with the people it governs, and needs, and should brook, no intermediaries.

Bickel, *The Voting Rights Cases*, 1966 Sup. Ct. Rev. 79, 89.

[7] In any case, as we discuss below, in the context of energy regulation, Congress has expressly authorized States to sue federal agencies. See, *e.g.*, *Maryland People's Counsel* v. *FERC*, 760 F.2d 318, 322 (D.C. Cir. 1985) (discussing cases).

U.S. 528, 533 n.5 (1974)). Hence, the dispositions of *New York* and *Phillips Petroleum* are not binding precedent on the jurisdictional issue presented here. And as this Court's subsequent decision in *Snapp* confirms (see 458 U.S. at 610 n.16), those cases did not silently overrule *Massachusetts* v. *Mellon*.[8] See also cases cited at page 7, *supra*.

2. Although some court of appeals decisions prior to *Snapp* nevertheless permitted *parens patriae* suits against the federal government (see, *e.g.*, *Washington Utilities & Transportation Comm'n* v. *FCC*, 513 F.2d 1142, 1153 (9th Cir.), cert. denied, 423 U.S. 836 (1975)), court of appeals decisions since *Snapp* have uniformly recognized that States do not have standing as *parens patriae* to sue the United States. See, *e.g.*, *Wyoming ex rel. Sullivan* v. *Lujan*, 969 F.2d 877, 882-883 (10th Cir. 1992); *Nevada* v. *Burford*, 918 F.2d 854 (9th Cir. 1990), cert. denied, 111 S. Ct. 2052 (1991); *Iowa ex rel. Miller* v. *Block*, 771 F.2d 347, 354-355 (8th Cir. 1985), cert. denied, 478 U.S. 1012

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[8] Petitioner argues (Pet. 12) that *Snapp* in fact undercuts the holding of *Mellon*. It relies on the Court's observation that a State may have an interest as *parens patriae* in seeing that "its residents are not excluded from the benefits that are to flow from participation in the federal system." *Snapp*, 458 U.S. at 608. But that observation cannot be understood to overrule the well-settled authority of *Mellon* and its progeny; the Court in *Snapp* was careful to emphasize that the Commonwealth's lawsuit was seeking "to secure the federally created interests of its residents *against private defendants*." 458 U.S. at 610 n.16 (emphasis added). In addition, the Court explicitly reaffirmed the principle that a State "does not have standing as *parens patriae* to bring an action against the Federal Government." *Ibid.* (citing *Mellon*, 262 U.S. at 485-486). Accordingly, petitioner's contention concerning *Snapp* is unfounded.

(1986); *Maryland People's Counsel* v. *FERC*, 760 F.2d 318, 320 (D.C. Cir. 1985) (Scalia, J.); cf. *Chiles* v. *Thornburgh*, 865 F.2d 1197, 1208-1209 (11th Cir. 1989) (denying standing to governor). Thus, contrary to petitioner's argument (Pet. 19), *Snapp* has abated rather than sown confusion in the lower courts.

Petitioner cites (Pet. 19-20) *United States Dep't of the Interior* v. *FERC*, 952 F.2d 538 (D.C. Cir. 1992), for the proposition that the courts of appeals are currently divided over the meaning of *Snapp*. To be sure, the court in the *Department of the Interior* decision noted that certain "state agencies ha[d] *parens patriae* standing" to challenge FERC licensing orders on the ground that FERC had insufficiently considered the environmental impacts. 952 F.2d at 544 n.4. For several reasons, however, that observation, which the court made in passing, does not create a conflict warranting review of the unpublished decision in this case. First, although the D.C. Circuit found *parens patriae* standing in *Department of the Interior*, it also concluded that two environmental groups making "identical substantive challenges" had associational standing (*ibid.*); hence, the court's statement regarding *parens patriae* standing was unnecessary to its disposition of the case. Second, *Department of the Interior* arose under a statute explicitly authorizing States aggrieved by a FERC order to challenge the order. See 16 U.S.C. 825*l*(a) and (b). No similar authorization appears in ANILCA.[9]

[9] The D.C. Circuit has indicated that the limitation on *parens patriae* standing is prudential and can be altered by Congress. See *Maryland People's Counsel*, 760 F.2d at 321-322. Although the unpublished decision here implicitly rejects that view (see Pet. App. 4a), this case is not an appropriate vehicle for addressing the issue. ANILCA contains no provision pur-

Third, to the extent that *Department of the Interior* is inconsistent with the D.C. Circuit's earlier decision in *Maryland People's Counsel*, that is a matter for the D.C. Circuit itself to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).[10] Further review is therefore unwarranted.[11]

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porting to authorize States to sue as *parens patriae*. Petitioner does not cite, and we are unaware of, any court of appeals decision holding that ANILCA provides for such standing.

[10] Petitioner errs in relying (Pet. 20) on *Alaska* v. *United States Dep't of Transportation*, 868 F.2d 441 (D.C. Cir. 1989). There, the court noted that the "precise contours of *parens patriae* standing * * * are somewhat unclear," but found it unnecessary to "delve into the issue" because "the States' sovereign interest in law enforcement is sufficient to support standing." *Id.* at 443 n.1. In addition, the court emphasized that the Federal Aviation Act expressly authorized a "body politic" or a "representative thereof" to challenge an order of the kind at issue in that case. See *id.* at 444. Thus, the decision in the *Department of Transportation* case is not in conflict with the decision here.

[11] Petitioner contends (Pet. 13) that the waiver of sovereign immunity in the Administrative Procedure Act, 5 U.S.C. 702, makes it anomalous to retain the doctrine that States cannot bring *parens patriae* suits against the United States. We are unaware of any general doctrine that a waiver of sovereign immunity also dispenses with standing requirements in suits against the United States, and petitioner cites no evidence that 5 U.S.C. 702 in particular was intended to have that effect.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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